IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1504

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

Attorney for Petitioner,
Herminio Cruz.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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Herminio Cruz, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (App. A, *infra*, pp. App. 1a-15a) is not yet reported.

JURISDICTION

The opinion of the Court of Appeals for the First Circuit was entered on March 9, 1979. No petition for rehearing was filed. This petition is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment was violated when the Court of Appeals (disregarding this Court's decision in *Jeffers v. U.S.*, 432 U.S. 158, 97 S.Ct. 2207 (1977), and relying on this Court's decision in *U.S. v. Bayer*, 331 U.S. 532 (1947)) held that successive federal prosecutions did not violate the Double Jeopardy Clause where both offenses related to the same subject matter, time, place and the same federal statutory scheme?

2. Whether *Jeffers v. U.S.*, stands for the proposition that successive federal criminal trials are barred where the government elects (over the defendant's objection) to try the defendant for the same underlying offense in two (2) separate trials and in two (2) separate jurisdictions?

3. Whether the Double Jeopardy Clause bars successive federal trials where the "same evidence test" [and arguably the same offense test] are clearly present in both trials?

(a) Whether this court should consider the "parameters" of the same evidence test in evaluating double jeopardy? (Compare *Sanabria v. U.S.*, ... U.S. ....., 98 S.Ct. at 2181, n.24 (1978); in *Sanabria* the Court declined reviewing the "same evidence test" although in *Ashe v. Swenson*, 397 U.S. 436 (1970) Justice Brennan (Justices Douglas and Marshall concurring) attempted to define the limitation of the "same evidence" test for double jeopardy purposes (397 U.S. 450-453).

4. Whether the "*Petite* Policy" was the subject of violation by the government and, whether that violation merits this Court granting certiorari to review the successive prosecution question?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

21 U.S.C. 841 provides in pertinent part:

> (a) * * * it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute * * * a controlled substance * * *.
>
> (b) * * * any person who violates subsection (a) * * * shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of

imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

(A)

One date, December 16, 1976. One transaction, the alleged possession of narcotics with the intent to distribute on December 16, 1976. One place, Chicago, Illinois. From this flowed two (2) indictments, trials, convictions and appeals and now, this petition. The essence of our claim is that the petitioner has been compelled to climb the ladder of successive-related prosecutions.[1]

(B)

Petitioner, Herminio Cruz, was indicted in the Northern District of Illinois (Chicago) on February 14, 1977 for the offense of possessing with intent to

[1] Petitioner's conviction from his jury trial in Chicago is pending in the Court of Appeals for the Seventh Circuit under Docket No. 78-1257, 2178 (consolidated). Pages 5-10 of our Statement of the Case, *infra*) relate same in more detail.

distribute a quantity of heroin in violation of Title 21 U.S.C. § 841(a)(1).[2] The underlying events (as offered by the government during petitioner's jury trial in Chicago in December, 1977) were that on the morning of December 16, 1976 two (2) persons journeyed from Massachusetts to Chicago. These persons were Rivera and Ms. Gonzalez (Tr. 33). Gonzalez and Rivera met at a restaurant on the north side of Chicago under surveil-

[2] The Chicago indictment, 76 CR 1285 is as follows:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

HERMINIO CRUZ.

No. 76 CR 1285
Violation: Title 21, United States Code, Section 841(a)(1)

The SPECIAL JUNE 1976 GRAND JURY charges:

On or about December 16, 1976, at Chicago, in the Northern District of Illinois, Eastern Division,

HERMINIO CRUZ,

defendant herein, knowingly and intentionally did possess with intent to distribute approximately 3842.07 grams of a mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(I).

A TRUE BILL:

FOREMAN

UNITED STATES ATTORNEY

lance of D.E.A. agents (Tr. 33).[3] During the afternoon hours Rivera and Gonzalez were driven to the home of DeLeon (Tr. 33). At about 1:30 p.m. DeLeon drove to a home jointly owned by the petitioner and his spouse located at 2514 West Haddon, Chicago.[4] DeLeon entered the premises carrying a bag and left some twenty (20) minutes later carrying a different color bag (Tr. 38-39). DeLeon returned to his premises and about an hour later DeLeon, Rivera and Gonzalez were seen on the north side of Chicago (by D.E.A.) flagging a cab. At least one of the D.E.A. agents clearly recognized that DeLeon and Rivera were different persons (Tr. 39-40). Gonzalez and Rivera went directly to the O'Hare Airport in Chicago and flew back to the Massachusetts area. On debarking the aircraft Ms. Gonzalez was seized by D.E.A. and a search of her luggage revealed a bag similar to that seen by D.E.A. in Chicago when DeLeon left the Haddon Street address earlier that afternoon (Tr. 40-41). The bag contained heroin. Massachusetts D.E.A. called Chicago D.E.A. and told him that Ms. Gonzalez had been arrested carrying heroin. The bag was described (Tr. 40-41, 47). Chicago D.E.A. consulted with an Assistant U.S. Attorney and a search warrant for the Haddon Street address was presented to U.S. Magistrate Balog at approximately 9:30 p.m. on Decem-

[3] Chicago D.E.A. was contacted by Massachusetts D.E.A. on the morning of December 16, 1976. The D.E.A. agents from Massachusetts advised Chicago D.E.A. that Gonzalez and Rivera were coming to Chicago to buy narcotics (Tr. 42-43). Massachusetts D.E.A. learned of the "events" based on a "claimed" court authorized wiretap on the telephone of Rivera in Massachusetts. Group Appendix B indicates that the Massachusetts wiretap was *never installed* (cf., Group App. B, *infra*).

[4] When petitioner posted bail in Chicago the deed showed that petitioner and his wife owned the home. Defense testimony indicated that petitioner and his spouse separated either in late 1975 or early 1976 (Tr. 298, 302-303).

ber 16, 1976.[4a] Prior to 10:00 p.m. any number of D.E.A. agents executed the warrant at the Haddon Street address. Hidden in a basement area was a quantity of heroin (Tr. 16-18). Petitioner was on the premises along with at least one other adult. Petitioner alone was arrested. The government offered evidence that petitioner made post-arrest oral admissions (Tr. 65-68). Petitioner denied making the admissions (Tr. 209-212).[5] On December 30, 1977, the trial in Chicago ended on the single count indictment (reproduced at n. 1) with a verdict of guilty. The verdict was read in open court on January 3, 1978.[6]

Prior to the commencement of the Chicago trial petitioner's trial counsel sent a letter to all counsel and

[4a] We have elected to eschew the opportunity to present any search warrant issued in this petition. Thus, the multi-page search warrant and affidavit are not submitted for this Court's consideration.

[5] In the Massachusetts proceedings the government elected not to use the alleged oral admissions during their case-in-chief (Tr. 2; Jan. 10, 1978; R. 38).

[6] The New Year's Holiday started on December 29, 1977. Court was adjourned while the jury was deliberating and the "sealed" verdict was opened on the first court day of 1978.

the presiding judge in Boston who was to hear the second case involving the petitioner.[7]

[7] The full text of the letter is as follows:

Letterhead of
ACKERMAN, DURKIN & EGAN

December 16, 1977

Honorable Frank H. Freedman
United States District Judge
United States Courthouse
Boston, Massachusetts 02109

RE: U.S. v. Rafael Rivera, et al.
77-205-F

Dear Judge Freedman:

In connection with the above-captioned cause please be advised that the co-indictee I represent, Herminio Cruz, has been set for trial on December 19, 1977 before the Honorable Judge Grady (U.S. District Court, Chicago, Illinois). Mr. Cruz is to stand trial under Ind. 76 CR 1285 (Northern District, Eastern Division, Chicago). The events portrayed in Ind. 76 CR 1285 comprise a scenario involving dates surrounding December 16, 1976. The indictment before Your Honor (77-205-F) as they relate to Mr. Cruz involve the same events as are portrayed in the Chicago indictment.

Judge Grady has been requested to consider a pretrial motion to dismiss, or otherwise compel the government to elect upon which of the two (2) pending indictments they will proceed AGAINST MR. CRUZ. It is our position that he can only be tried on one of the two (2) cases in that both arise out of the same circumstances and events (albeit the Springfield, Mass., indictment). Judge Grady has not decided whether he will dismiss or compel the government to elect. The Asst. United State's Attorneys in Chicago have advised that they plan to go forward notwithstanding the fact that they are fully aware of the pending Springfield indictment.

Page two
December 16, 1977

It is the position of Herminio Cruz that he cannot be tried on both cases by the government in two (2) different jurisdictions. As they relate to Mr. Cruz the facts and circumstances arise from the same series of events (the search and seizure of a home in Chicago and the recovery of contraband on December 16, 1976).

(Footnote continued on following page)

Prior to jury selection in the Chicago trial government counsel moved to continue the Chicago trial. The reason the government moved to continue the Chicago trial was because of the upcoming conspiracy trial in Massachusetts. Judge Grady, in Chicago, declined to continue the

[7] *continued*

Accordingly, I take this opportunity to advise you that IN ALL PROBABILITY in the event the evidence in Chicago turns out to be the same as that which the government has indicated will be presented in Springfield then we shall file a motion to dismiss the Springfield Indictment under double jeopardy grounds. Compare, *Abney v. U.S.*, 431 U.S. ....., 97 S.Ct. 2034 (1977); *Brown v. Ohio*, ... U.S. ....., 97 S.Ct. 2221 (1977); *Jeffers v. U.S.*, ... U.S. ....., 97 S.Ct. 2207 (1977) and *Harris v. Oklahoma*, ... U.S. ....., 97 S.Ct. 2912 (1977). See Also, *Sanabria v. U.S.*, 548 F.2d 1 (1st Cir., 1977), cert. granted ..... U.S. ....., 97 S.Ct. 2970 (1977); and *U.S. v. Bynoe*, 562 F.2d 126 (1st Cir., 1977).

The composite of these cases (in our view) would tend to indicate that Mr. Cruz is being exposed to a "double jeopardy situation". My approach will be (depending upon the evidence or the trial court's decision in the Chicago case) to seek indictment dismissal before your Honor on double jeopardy grounds. As the above string of citations indicate the claim by Mr. Cruz may be viable and correct, and in the event your Honor would deny such a motion then Mr. Cruz would seek immediate relief by way of a pretrial appeal to the Court of Appeals for the First Circuit.

I take the unusual liberty of writing to Your Honor (with copies, of course, to the government) so that all parties are put on notice as to our intentions in connection with a possible pretrial appeal. The pretrial motion(s) filed on behalf of Cruz for both indictment dismissal and/or severance have heretofore been denied by this Court. It may be that your Honor might consider this letter as a "renewal" of both motions heretofore filed by Cruz.

Very truly yours,

Allan A. Ackerman
Attorney for Herminio Cruz

AAA/jl
cc: David P. Twomey and Walter Prince (AUSA)
W. Cook and T. McQueen (AUSA) Chicago, by Messenger
Karl W. Fagan, Deputy Clerk

trial and after the government refused to dismiss the Chicago indictment (so as to allow the Massachusetts trial to go forward with no jeopardy questions) jury selection in Chicago proceeded. The trial went to verdict; same being spread of record on January 3, 1978.[8]

(C)

On June 23, 1977 petitioner was indicted in the District Court in Massachusetts under indictment 77-205-F. That single count indictment charged several defendants with violating Title 21 U.S.C. § 846. Named defendants included those acting in Chicago on December 16, 1976 (Rivera and DeLeon); Ms. Gonzalez was an unindicted co-conspirator as Group Appendix D indicates. Of the thirty-two (32) overt acts charged only numbers 25, 26 and 32 reflect no contact with Chicago. The petitioner at all times herein pertinent lived in Chicago as did the co-defendants Jose and Marie DeLeon. *Petitioner was the only defendant charged in the single count indictment in Chicago* (n. 2). The petitioner's "conduct" in the Massachusetts indictment REFLECTS ONLY THE SAME EVENTS FOR WHICH HE WAS CHARGED UNDER THE CHICAGO INDICTMENT; cf., Overt Acts, para. 16-17, App. D, *infra*. Overt Acts 7 through 24 were part and parcel of the evidence presented to the trial jury in Chicago.

[8] From November, 1977 to the date the Chicago trial commenced (December 27, 1977) petitioner repeatedly sought a *single consolidated trial*. The government's position was consistently the same until the morning of December 27, 1977 when they asked that the Chicago trial be continued so that the Massachusetts trial could proceed without any double jeopardy problems (compare Appendix C, *infra*).

On January 5, 1978 (two (2) days after petitioner's jury verdict in Chicago was spread of record) a motion to dismiss indictment 77-205-F was presented to the trial judge in Boston.[9] The trial judge denied the motion to dismiss on double jeopardy grounds and directed that counsel forthwith appeal[10] (Tr. 10-11, Grp. App. E, *infra*). The motion to dismiss was denied at approximately 11:30 a.m. on January 5, 1978 and somewhere around 3:00 p.m. trial counsel for Cruz was arguing dismissal *vel non* before the Court of Appeals.[11] The Court of Appeals adjourned the case til January 6 for reargument and late on January 6 filed an opinion denying double jeopardy relief and directing the January 9, 1978 trial to go forward.[12]

Jury Selection convened on January 9, 1978. On January 11, 1978 the trial court agreed to sever petitioner. A jury was waived and it was agreed that

[9] Original record, C-36. The short "hearing" before the trial judge is reproduced at Appendix E, *infra* for the ease of reference. We ask this Court to note that no hearing was held and the government was not required to meet any burden of either proceeding or proof, *vis-a-vis*, the non-frivolous double jeopardy claim. In *U.S. v. Inmon*, 568 F.2d 326 (3rd Cir., 1977) the Court found that when a claim of this nature is presented the government must prove by a preponderance of the evidence that the *successive federal prosecutions* are not identical (568 F.2d at 331-332).

[10] The jury trial on the Massachusetts indictment was to commence on January 9, 1978 in Springfield, Massachusetts before Judge Freedman. The motion to dismiss was presented to Judge Freedman in Boston. The Court of Appeals for the First Circuit was in session on January 5, 6, 1978.

[11] While *Abney v. U.S.*, 431 U.S. ....., 97 S.Ct. 2034 (1977) suggests that pretrial double jeopardy motions could be considered expeditiously . . . this was super-expeditious. Petitioner's counsel had only the pleading filed in the District Court. The government, on the other hand, had prepared a brief seeking summary disposition.

[12] *U.S. v. Cruz*, 568 F.2d 761 (1st Cir., 1978).

the case would be submitted, *Aliunde*, on the Chicago Trial Transcripts (Cf., Grp. App. F, *infra*).[13]

On March 22, 1978 petitioner appeared for the "stipulated" trial. The government opined that their case:

> "Yes, it would be 99 percent the same, the same being that 99 percent of what took place in the trial in Chicago . . ." (3/22/78; Tr. 11).

In addition to the Chicago trial transcripts the government offered a stipulation of facts (C-37). Petitioner declined to stipulate but represented that there would be little question that the government could offer proof to support their stipulation (Tr. 26-29). The Court took the stipulation and the Chicago trial transcripts. Petitioner rested on his motion for judgment of acquittal (C-39). Included in the 54 page transcript of March 22, 1978 is the legal argument proffered by petitioner supporting his motion for judgment of acquittal (Tr. 22-34; 39-40). On March 22, 1978 Judge Freedman found petitioner guilty of conspiracy and imposed a sentence of fifteen (15) years in custody concurrent with the fifteen (15) year sentence imposed on petitioner by Judge Grady on February 22, 1978.[14] [15]

[13] The jury waiver is reflected at C-36. Prior to jury selection (January 9, 1978) the government *for the first time* filed a notice for an "on and after sentence", cf., 21 U.S.C. § 851. The indictment had been pending from about July, 1977 and this was the first time the government indicated they were seeking an accelerated sentence. As part of the "stipulated trial agreement" the government withdrew the notice for an accelerated sentence (Tr. 2-5; C-38). Grp. App. F reproduces the 5 page transcript of Jan. 11, 1978.

[14] Petitioner's Chicago conviction is currently pending without decision, before the Court of Appeals for the Seventh Circuit under Docket Nos. 78-1257, 2178.

[15] The decision from the Court of Appeals adopts its earlier summary decision denying double jeopardy relief, *U.S. v. Cruz*, 568 F.2d 781 (1st Cir., 1978). On the second appeal (from which this petition is presented) the Court of Appeals adopted its earlier denial of relief (Slp. Op. 2, n.2, Appendix A-2a, *infra*).

REASONS FOR GRANTING THE WRIT

Questions 1 and 2.

The Court of Appeals decided the double jeopardy claim adversely to the petitioner based on a 1947 decision from this Court, *U.S. v. Bayer*, 331 U.S. 532 (1947). This Court's decision in *Jeffers v. U.S.*, 432 U.S. 158 (1977) may well have overruled *Bayer*. In any event the Court below found a conflict as between the two (2) decisions. The resolution of that conflict is herein presented.

The primary purpose of the Double Jeopardy Clause is [was] to prevent successive trials (*U.S. v. Wilson*, 420 U.S. 332 (1975)). In *Jeffers v. U.S.*, 432 U.S. 158, 97 S.Ct. 2207 (1977) *Jeffers* was indicted for two (2) separate but related, drug offenses. The government sought the trial court to consolidate the indictments for a single trial. *Jeffers* opposed consolidation. *Jeffers* was tried and convicted under each of the two (2) indictments. Before this Court *Jeffers* urged reversal of his conviction on the second indictment . . . based on double jeopardy violations. A plurality found *Jeffers* not entitled to that relief. Justice Powell, writing the plurality decision, found that at least for the purposes of the decision Title 21 U.S.C. § 846 was a lesser included offense and that the indictment and trial under 21 U.S.C. § 848 (the second trial) was a greater offense (97 S.Ct. at 2215-2216). Thus, traditional double jeopardy considerations might have made the Fifth Amendment applicable except for a peculiar fact. That peculiar fact was that *Jeffers* expressly sought separate trials. *Jeffers* opposed consolidation and persuaded the trial court to honor his election that the indictments be tried separately (97 S.Ct. at 2217). As may be pertinent

to the questions now presented we quote from *Jeffers* as follows:

> "If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the *Brown* rule emerges." (97 S.Ct. at 2217)
>
> * * * * *
>
> "In this case, trial together of the conspiracy and continuing criminal enterprise charges could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial." (97 S.Ct. at 2217)
>
> * * * * *
>
> "Instead, *he was solely responsible for the successive prosecutions for the conspiracy offense and the continuing criminal enterprise offense. Under the circumstances, we hold that his action deprived him of the right that he might have had against consecutive trials.*" (97 S.Ct. at 2218)
>
> "The right to have both charges resolved in one proceeding, if it exists, was *petitioner's*; it was therefore his responsibility to bring the issue to the District Court's attention." (97 S.Ct. at 2218, n.22)
>
> * * * * *
>
> B. *Brown v. Ohio*, ... U.S. ....., 97 S.Ct. 2221, 51 L.Ed.2d ..... decided today, establishes the general rule that the Double Jeopardy Clause prohibits a State or the *Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense.* Post, at ....., 97 S.Ct. at 2226-2227." (97 S.Ct. at 2216)[15a]

[15a] Petitioner only asked that the Government try him *once*. We have found no dispositive authority that 21 USC 841(a)(1) is a lesser included offense within 21 USC 846 (Conspiracy). In *U.S. v. Swiderski*, 548 F.2d 445 (2nd Cir., 1977) the Court found that 21 USC 844 was included in 21 USC 841(a)(1). In *Jeffers* this Court ruled that 21 USC 846 was included in 21 USC 848. How can 841(a)(1) not be included in 846 under the circumstances *of this case*?

In addition the plurality decision offered a thoughtful footnote for future reference. *The future is now*. Justice Powell offered the following thought on successive federal trials:

> The considerations relating to the propriety of a second trial obviously would be much different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. No hint of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together. (97 S.Ct. at 2217, n.20)[16]

Jeffers was decided on June 16, 1977. On the same date Justice Powell wrote the decision in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221 (1977). In *Brown* the Court found that the Double Jeopardy Clause prohibited the state [or the government] from trying a defendant for a greater offense after he had been convicted of a lesser offense . . . 432 U.S. at ....., 97 S.Ct. at 2226-7. In *Brown* the petitioner was convicted, after a guilty plea, of joyriding in a stolen car. Upon serving his moderate sentence (30 days in custody) he was later charged in another court in Ohio with a greater offense (theft of the same car). His double jeopardy claim, was dismissed and he entered a guilty plea and was given probation. This Court, reversed. Justice Powell, writing the majority (just as in *Jeffers*) found:

> "The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. It protects against multiple punishments for the same offense"

[16] *Sub silentio* the plurality likened *Jeffers'* request for separate trials, and then seeking double jeopardy relief on appeal, to a form of "gamesmanship". Compare *U.S. v. Kopel*, 552 F.2d 1265 (7th Cir., 1977); *U.S. v. Krohn*, 560 F.2d 293 at 297 (7th Cir., 1977).

. . . *North Carolina v. Pearce*, 395 U.S. 711 at 717, 89 S.Ct. 2072 at 2076 (1969).

* * * * *

"Where *successive prosecutions* are at stake, the guarantee serves a constitutional policy of finality for the defendant's benefit (cit. omtd) . . . 97 S.Ct. at 2225. That policy protects the accused from attempts to relitigate the facts under an underlying prior acquittal (cits. omtd) and from attempts to secure additional punishment after a prior conviction and sentence . . . (cits. omtd., 97 S.Ct. at 2225).

In *Brown*, at n. 5, the Court points out:

"Nor are we concerned with the permissibility of separate prosecution on closely related criminal charges when the accused opposes a consolidated trial, e.g., *Jeffers v. U.S.*, ... U.S. ....., 97 S.Ct. 2207" (97 S.Ct. at 2225).

Again, as may be pertinent to this case, in *Brown*, at n. 6 the Court points out:

"Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, *successive prosecutions* will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first" . . . (97 S.Ct. at 2226, n. 6).

In *Brown*, Justice Brennan, with whom Justice Marshall joined, concurred, and, in part stated:

"I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "*all the charges against a defendant that grow out of single criminal act, occurrence, episode or transaction.*" *Ashe v. Swenson*, 397 U.S. 436, 453-454, 90 S.Ct. 1189, 1199, 25 L.Ed.2d 469 and n.7 (1970) (Brennan, J., concurring). See *Thompson v. Oklahoma*, ... U.S. ..... , 97 S.Ct. 768, 50 L.Ed.2d

770 (1977) (Brennan, J., dissenting), and cases collected therein." (97 S.Ct. at 2227)

Last term this Court held that the Double Jeopardy Clause prohibited cumulative punishment where weapons were used in the course of an armed bank robbery. In *Simpson v. U.S.*, 435 U.S. 6, 98 S.Ct. 909 (1978) this Court held that the Double Jeopardy Clause prohibited cumulative punishment where weapons were used in the course of an armed bank robbery (Cf., 18 U.S.C. 924(c); 2213(a,d). As may be pertinent to our inquiry this Court stated:

". . . The Double Jeopardy Clause "protects against multiple punishment for the same offense," *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), and prohibits *multiple prosecutions for the "same offense," Jeffers v. United States*, 432 U.S. 137, 150-151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977)." (98 S.Ct. at 912, n.5).

The Court of Appeals expressly found that neither *Brown* nor *Jeffers* overrules *Bayer v. U.S.*, 331 U.S. 532, 67 S.Ct. 1394 (1947).[17] In *Bayer* the government sought review of an order from the Court of Appeals for the Second Circuit. The Court of Appeals had reversed a conspiracy conviction relating to unfaithful Army service during World War II (156 F.2d 964 (2nd Cir., 1946)). This Court found that the Court of Appeals was wrong in reversing the jury conviction based upon certain evidentiary rulings during trial (331 U.S. at 538-9). In addition, the Court found that the trial court's ruling relating to the admission of a confession was not error, as the Court of Appeals had apparently ruled (331 U.S. at 540). Finally this Court found that a previous *court martial proceeding* did not compel a finding of double

[17] Cf., *U.S. v. Cruz*, 568 F.2d 781 at 783 (1st Cir., 1978); *U.S. v. Cruz*, ... F.2d ....., Slp. Op. 2, n.2, App. A, *infra* (1st Cir., 1979).

jeopardy (331 U.S. at 541-542). The Court of Appeals had not directly passed on the double jeopardy question, rather the Court of Appeals had left the question open for certain factual determinations on remand (156 F.2d at 970). This Court (in 1947) decided that the Double Jeopardy Clause was not violated by virtue of the earlier court martial proceedings (331 U.S. at 542-543).[18] It is with more than passing interest that this Court, in *Bayer*, reviewed *Grafton v. U.S.*, 206 U.S. 333, 27 S.Ct. 749 (1906) . . . at 331 U.S. 542. In *Grafton* this Court found that the Double Jeopardy Clause prohibited a local prosecution after *Grafton* had been subjected to court martial proceedings where the alleged conduct by *Grafton* was identical in each proceeding (27 S.Ct. at 750). Justice Harlan, writing for the Court, declined the opportunity to set out any particular rules for "the same offense". Justice Harlan noted the difficulties of such an analysis as follows:

> It may be difficult at times to determine whether the offense for which an officer or soldier is being tried is, in every substantial respect, the same offense for which he had been previously tried. We will not therefore attempt to formulate any rule by which every conceivable case must be solved. (27 S.Ct. at 755)

Did the instant prosecution suffer the impermissible vice of either double jeopardy prohibition or, successive-related prosecutions? We answer both, *yes*. In *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912 (1977) at 2913, the Court stated:

> ". . . (A) person (who) has been tried and *convicted* for a crime which has *various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.*" 131 U.S., at 188, 9 S.Ct. at 676. See

[18] Justices Frankfurter and Rutledge dissenting (331 U.S. at 543).

> also *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970); *Grafton v. United States*, 206 U.S. 333, 352, 27 S.Ct. 749, 754, 51 L.Ed. 1084 (1907)." (97 S.Ct. at 2913).[19]

There can be absolutely no question that the government could have tried the petitioner at bar within the parameters of a single indictment and in a single jurisdiction. Under Rule 8, Fed.R.Crim.Proc., offenses should be joined in a single indictment.[20] The sole acts attributed to the petitioner at bar occurred in Chicago, Illinois on December 16, 1976. In each jurisdiction no other acts were offered. During the jury trial in Chicago from December 27, 1977—January 3, 1978 the trial jury received evidence of the comings and goings of Rivera,

[19] Justices Brennan and Marshall specially concurred in the *Harris* "Per Curiam" decision urging that the 5th Amendment required a single prosecution of ". . . all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction . . ." (97 S.Ct. at 2913, cites omitted). The Court's decision denying *Cruz* double jeopardy relief, relied on *Bayer v. U.S.*, 331 U.S. 532 (1947). *Bayer*, in turn, relied in part on *Grafton v. U.S.*, 206 U.S. 333 (1907). Now, in *Harris, ante*, the Court reverses the *Harris* conviction relying, in part, on *Grafton;* 97 S.Ct. at 2913. Thus, the circle is completed.

[20] Rule 8 reads as follows:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

DeLeon and Ms. Gonzalez (cf., Statement of Facts, *ante*, at 5-7). It would be pure folly for the government to urge this Court that the offense(s) charged . . . could and should have *not* been charged in a single indictment and for a single trial.

Question 3.

The Circuits are hardly in accord. The presentation of this petition requires the resolution of the conflict(s) on how to treat double jeopardy. In this case the 1st Circuit found no double jeopardy in successive-related prosecutions *albeit* even the government agreed that the proof in both indictments was 99 percent the same (Tr. 11; 3/22/78). The 2nd Circuit has declined to allow the government to bifurcate related indictments, using a double jeopardy analysis (*U.S. v. Papa*, 533 F.2d 815 at 820-823 (2nd Cir., 1976) (considering the same evidence test at 820-823); *U.S. v. Sperling*, 560 F.2d 1050 (2nd Cir. 1977) (granting double jeopardy relief on successive related indictments (1053-1057). The 5th Circuit reversed three (3) separate convictions in its 1978 term . . . all on double jeopardy grounds, *U.S. v. Kehoe*, 573 F.2d 335 (5th Cir., 1978); *U.S. v. Ruigomez*, 576 F.2d 1149 (5th Cir., 1978); *U.S. v. Marable*, 578 F.2d 151 (5th Cir., 1978). In *Marable* the Court spoke of the "same evidence test" while reversing successive federal narcotic trials, 578 F.2d at 153. The 6th Circuit granted double jeopardy relief in *U.S. v. Austin*, 529 F.2d 559 (6th Cir., 1976). In *Austin*, the Court vacated the conviction on the conspiracy count after *Austin* was convicted on each count in an indictment variously charging violations of 18 U.S.C. § 201(f)(g). The Court in *Austin*, while vacating the conspiracy conviction addressed the "same evidence test" . . . 529 F.2d at 562-563. The lack of accord was succinctly pointed out in another recent 5th Circuit decision.

In *U.S. v. Garcia*, 589 F.2d 249 (C.A. 5, 1979) the Court suggested that the question (double jeopardy *vel non* on successive trials) was not so easy to answer. The Court stated:

> "While conspiracy is normally a sufficiently distinct offense from an underlying substantive offense so that the Double Jeopardy clause does not bar prosecution of both, *U.S. v. Jasso*, 442 F.2d 1054 (5th Cir., 1971), there has been considerable debate in the courts recently about the double jeopardy problem in combined conspiracy and substantive offense prosecutions involving virtually identical elements and evidence. See, e.g., *U.S. v. Austin*, 529 F.2d 559 (6th Cir., 1976), *contra U.S. v. Kearney*, 560 F.2d 1358, 1365, 1367 (9th Cir., 1977). We note that in our own Circuit a District Court recently decided a version of this question, and that the appeal of that decision is pending. *U.S. v. Coward*, No. CR 77-200 A (N.D. Ga. 1978), appeal docketed, No. 78-5175 (5th Cir., March 6, 1978)" (589 F.2d at 251).

As we point out *infra* the 5th Circuit expressly rejected (in *Kehoe*, *Ruigomez* and *Marable*) the narrow construction of the "same offense" test that the Court of Appeals supplied in rejecting our double jeopardy claim in this case. Additionally, we note that this Court declined to reach the "same evidence" test while deciding *Sanabria*.

In *Sanabria v. U.S.*, ... U.S. ..... , 98 S.Ct. 2170 (1978) this Court overturned a decision from the Court of Appeals for the First Circuit. This Court ruled that the midtrial finding by the trial judge that the government had not sustained its burden precluded a second trial (and thus reversed the Court of Appeals). This Court in *Sanabria* declined to review the "same evidence" test. Justice Marshall, writing the *Sanabria* decision, stated:

> Because only a single violation of a single statute is at issue here, we do not analyze this case under

> the so-called "same evidence" test, which is frequently used to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under separate statutes. (cits. omtd) Nor is the case controlled by decisions permitting prosecution under statutes defining as the criminal offense a discrete act, after a prior conviction or acquittal of a distinguishable discrete act that is a separate violation of the statute. (Cits. Omtd; 98 S.Ct. at 2181-82, n.24)

In *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970) this Court granted habeas relief to a petititioner who had been successively prosecuted in state court for armed robbery offenses that took place in 1960. The underlying event was the armed robbery of several people who were playing poker. At the first trial, petitioner was acquitted. Six (6) weeks later the petitioner was brought to trial for the armed robbery of another participant in the same poker game. His timely motion for dismissal was denied. After the second trial he was convicted. This Court, granted habeas relief finding that the Double Jeopardy Clause of the Fifth Amendment barred retrial after a jury verdict in favor of the accused found, in the first trial, that he was not one of the robbers (397 U.S. at 445-446). Justice Brennan, in a separate concurring opinion (along with Justices Douglas and Marshall) found that double jeopardy applied but attempted to define the parameters of double jeopardy within the concept of "same offense" (397 U.S. at 450). The essence of this concurring opinion is simply that the "same offense" and the "same evidence test" are not the same. Justice Brennan pointed out that the "same evidence test" is not constitutionally required, and it was first expounded after the adoption of the Fifth Amendment (397 U.S. at 453). Justice Brennan's concurring opinion in *Ashe*, culminated in equating the "same transaction test" to the "same offense" test . . . the same offense test being

embodied in the constitutional mandate (*id.* at 454-55). The thrust of the special concurring opinion is simply that under modern theories of criminal jurisprudence the only realistic way to give sanction and affect to the Double Jeopardy Clause is to equate the same transaction standard into the same offense test. Thus, simply stated, an accused would be facing, in a single trial, whatever it was that occurred, and thus he would not be subjected to successive prosecutions "for the same transaction)) . . . *id.* at 457-459. Further, the Modern Federal Rules of Criminal Procedure allow for the joinder of offenses, Rules 8(a) and 13, Fed.R.Crim. Proc. Justice Brennan specifically found that the *"same evidence test" would not serve to protect defendants from multiple trials* (*id.* at 457).

In *Ashe*, the substance of the Court's opinion (Justices Brennan, Marshall and Douglas concurring) (Justice Berger, dissenting) was that successive trials were offensive to the concept of the Double Jeopardy Clause.

In *Sanabria*, while finding that the Double Jeopardy Clause precluded additional litigation Justice Marshall reminded the government:

> "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown v. Ohio, supra*, 432 U.S., at 169, 97 S.Ct. at 2227, or, as we hold today, into "discrete bases of liability" not defined as such by the legislature. See *id.*, at 169 n.8, 97 S.Ct. at 2227. (98 S.Ct. at 2183)

We note with interest that in *Sanabria* the government argued that successive prosecutions were not barred. In support of same the government offered *U.S. v. Kehoe*, 516 F.2d 78 (5th Cir., 1975) (Gov. Brf. pp. 29, 40). In *Kehoe* a pretrial motion seeking indictment dismissal was granted. On the government appeal, the

Court of Appeals reversed finding that a trial under a separate but related statutory charge did not violate double jeopardy. At trial *Kehoe* was convicted and he sought review. The Court of Appeals reversed his conviction on double jeopardy grounds.[21] The Court found that 18 U.S.C. § 657 and § 1006 were sufficiently related so that the earlier trial on § 657 amounted to double jeopardy on the indictment charging § 1006 . . . even though § 1006 apparently required or included an element not contained in § 657. While reversing, the Court cited to *Brown v. Ohio* (573 F.2d at 345) and reversed the conviction finding:

> Although § 1006's fourth element has no analog in § 657, the *Blockburger* test is not thereby satisfied because *each* statute must contain an element that the other does not and Section 657 contains no element not present in § 1006. We therefore, hold that § 657 and § 1006, although not identical because of the § 1006 "act of the institution" requirement, are *sufficiently similar that successive prosecutions under the statute offend the constitutional prohibition against double jeopardy.* (573 F.2d at 346)

In *U.S. v. Ruigomez*, 576 F.2d 1149 (5th Cir., 1978) the Court reversed a narcotic conspiracy conviction on double jeopardy grounds. *Ruigomez* had been earlier acquitted on an indictment charging a conspiracy involving the importation of marijuana. Post-acquittal the government returned a second indictment with differing overt acts. While sustaining the double jeopardy claim and reversing the conviction the Court of Appeals would not let the government split narcotic conspiracies and initiate additional prosecutions (as the government did here). While reversing, the *Ruigomez* Court offered the following:

> The government argues that differing overt acts were alleged in the indictments, urging us to

[21] *U.S. v. Kehoe*, 573 F.2d 335 (5th Cir., 1978).

> resolve the double jeopardy question by means of the "same offense" test, which focuses upon the similarity or dissimilarity of the evidence adduced in the multiple prosecutions. *See United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), *cert. denied*, 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976); *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975); *United States v. McCall*, 489 F.2d 359, 362-63 (2d Cir. 1973), *cert. denied*, 419 U.S. 849, 95 S.Ct. 88, 42 L.Ed.2d 79 (1974); *Dryden v. United States*, 403 F.2d at 1009. We decline to apply that test in cases such as this one, however, *because it would permit the government arbitrarily to split unitary narcotics conspiracies and to initiate as many prosecutions. See United States v. Papa*, 533 F.2d at 820; *United States v. Mallah*, 503 F.2d at 985; *United States v. Young*, 503 F.2d 1072, 1075 (3d Cir. 1974); *United States v. McCall*, 489 F.2d at 362-63.
>
> (576 F.2d at 1151)[23]

In *U.S. v. Marable*, 578 F.2d 151 (5th Cir., 1978) the Court reversed a narcotic conviction wherein *Marable* was charged with a conspiracy after he had already

[23] In *U.S. v. Mallah*, 503 F.2d 971 (2nd Cir., 1974) the Court reversed, in part, certain narcotic offenses finding that the government had unnecessarily separated conspiracies for the purpose of separately indicating *Mallah* and others. While reversing the Court utilized the "same offense" test stating:

> "The traditional "same offense" test focuses on the evidence adduced. Offenses are the "same" for the purposes of the double jeopardy guarantee when "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other." *United States v. Kramer*, 289 F.2d 909, 913 (2nd Cir., 1961)." (503 F.2d at 985)

In *Mallah*, the court also discussed a double jeopardy concept labeled "policy of fairness". The court found the "policy of fairness" standard would require the government to try all offenses together, thus barring successive prosecutions (503 F.2d at 985, n.7).

been convicted of a similar conspiracy (almost as this case). While reversing the Court reviewed 21 U.S.C. § 846 and found that since no overt acts need be utilized under Title 21, the particular charge differs from 18 U.S.C. § 371 . . . 578 F.2d at 153-154. As relating to the same evidence test[24] the Court stated:

> Testing whether two alleged conspiracies are in fact the same calls upon us to make an inquiry into the record more detailed than that required with respect to other offenses under the "same evidence" test, *cf. United States v. Ruigomez*, 576 F.2d 1149, No. 77-5391 (5th Cir., 1978), because, by the nature of the crime, the precise bounds of a single conspiracy seldom will be clear from the indictment alone.

(578 F.2d at 153)

However, in *Marable*, while sustaining the double jeopardy claim the Court quoted from *Sanabria* as follows:

> The statutes upon which prosecution rests distinguish this case from situations in which the defendant asserts a double jeopardy claim where the government has charged conspiracies under separate special conspiracy statutes. The Double Jeopardy Clause imposes few limits on the legislative power to define offenses. However, once Congress has defined the allowable unit of prosecution, that prescription determines the scope of protection afforded by a prior conviction. See *United States v. Sanabria*, ... U.S. ....., 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

(578 F.2d at 154, 155, n. 1)

In the present case the petitioner was charged in Chicago under 21 U.S.C. § 841(a)(1) and in Boston under 21 U.S.C. § 846 as conspiring to violate 21 U.S.C.

[24] Justice Brennan rejected the same evidence test for double jeopardy purposes in *Ashe v. Swenson, ante*, 397 U.S. 450-454 (1970).

§ 841(a)(1) (both statutes having been earlier set forth in this petition at pg. 3). We suggest that this is purely a case where the government has taken the same statute and the same offense and divided it into units of prosecution to suit their purpose . . . dual prosecutions of this petitioner. This, if the Court please, is double jeopardy violated in its purest form.[25]

Question 4.

After the decisions in *Jeffers* and *Brown, ante*, the Court reviewed successive state-federal prosecutions in *Rinaldi v. U.S.*, 434 U.S. 22, 98 S.Ct. 81 (1977). *Rinaldi* had originally been convicted in State court of a Florida hotel robbery (98 S.Ct. at 82). A federal indictment charging him with similar acts albeit under federal statutes resulted in a mistrial after the state conviction and sentence (id at 82). A second federal prosecution resulted in a conviction and sentence. On appeal the government acknowledged that its *Petite* Policy had been violated and sought remand for the purpose of indictment dismissal.[26] Same was granted but on remand the District Court declined to dismiss the indictment and after an "en banc" vote, the District Court's refusal was

[25] In the present case the Court of Appeals, while finding no double jeopardy made much of the fact that the Chicago indictment was under 21 U.S.C. § 841(a)(1) and their indictment was under 21 U.S.C. § 846 (568 F.2d at 782-783). In essence the Court of Appeals in this case found that § 841 was not a lesser included offense within § 846. According to *Brown v. Ohio, ante*, it doesn't really matter whether the first trial is for a greater offense or a lesser offense (97 S.Ct. at .....). The gist of the double jeopardy claim is that the first trial had nearly all the ingredients of the second and at no time DID THE PETITIONER AT BAR SEEK SEPARATE OR SEVERED TRIALS (compare *Jeffers*, 97 S.Ct. at 2217, n.20). Therefore this Petition presents the situation that this Court didn't consider in *Jeffers* (e.g., where the defendant does not seek separate trials . . . do separate successive related prosecutions fall within the prohibition of the Double Jeopardy Clause).

[26] The *Petite* Policy is explained at 98 S.Ct. 82, n.5.

upheld (544 F.2d 203, 5th Cir., 1976). The Supreme Court reversed and directed that the District Court dismiss the indictment. As may be pertinent to our inquiry the Court stated:

> "Although not constitutionally mandated, this executive policy serves to protect interests which, but for the "dual sovereignty" principle inherent in our federal system, would be embraced by the Double Jeopardy Clause. In light of the parallel purposes of the government's Petite policy and the fundamental constitutional guaranty against double jeopardy, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy." (98 S.Ct. at 85)

Defense counsel is without knowledge as to whether the *Rinaldi* doctrine is viable where federal-federal successive prosecutions are involved. It would seem that the *Petite* Policy is at least as viable. Surely, the case at bar is a prime example of successive prosecutions by the same sovereign, in a situation where the government well knew that as to petitioner the December 16, 1976 evidence was the same for the purposes of both indictments.

It would seem, more probable than not, that agencies of the federal government are bound by the rules and regulations which they officially promulgate (*Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The *Petite* Policy [it would seem] has risen to the level of "rules and regulations" and since the government, *sua sponte* promulgated the *Petite* Policy we urge that this Court review this policy and finalize its enforcement *vel non*. In the present status of the "*Petite* Policy" this Court and federal litigants are left to the mercy of the government prosecutors. The constitutional mandate cannot be left simply in the hands of the government prosecutor (as per Justice Stewart's dissent in *Scarborough v. U.S.*, ... U.S., ... 97 S.Ct. 1963 at 1872, n. 1 (1977).

Pending before this Court in *U.S. v. Caceres*, Docket No. 76-1309. That case is before this Court on the Government's Petition for Review after the Court of Appeals for the Ninth Circuit suppressed certain records in an I.R.S. case. The government's position in *Caceres* is that the exclusionary rule ought not apply where the claim for relief has its predicate on the Rules and Regulations of a government agency. The government's brief offers *Rinaldi* and the "*Petite* Policy" as authority for the fact that a litigant has no right to defend on the internal regulations of a governmental body (Gov. Brf. in *Caceres*, at pg. 25, 38). It may be that the decision in *Caceres* will carry a message as to the viability of the "*Petite* Policy" and whether or not this Court will *compel* the government to avoid the dilemma of successive federal prosecutions where the underlying acts are clearly related and where the accused [and the Court] could have best been served by a single prosecution.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

Attorney for Petitioner,
Herminio Cruz.

GROUP APPENDIX A

United States Court of Appeals
For the First Circuit

No. 78-1146

UNITED STATES OF AMERICA,
APPELLEE,
v.
HERMINIO CRUZ,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Allan A. Ackerman, with whom *Ackerman, Durkin & Egan*, was on brief, for appellant.
Walter B. Prince, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

March 9, 1979

BOWNES, *Circuit Judge*. The procedural aspects of this case are a little out of the ordinary. Defendant-appellant, Herminio Cruz, appeals his conviction by the district court sitting without a jury of conspiracy to possess with intent to distribute and distribution of heroin in violation of 21 U.S.C. § 841(a)(1) and § 846. Appellant was indicted, along with eight codefendants, on a one count conspiracy charge. All eight codefendants pleaded guilty prior to trial. Appellant had been convicted on December 30, 1977, and sentenced to a term of fifteen years after a jury trial in the Northern District of Illinois of possession of heroin with

intent to distribute based on the same facts that were the basis of the conspiracy indictment. We held, on an interlocutory appeal, that the double jeopardy proscription of the Constitution did not bar the conspiracy prosecution in the District Court of Massachusetts. *United States* v. *Herminio Cruz*, 568 F.2d 781 (1st Cir. 1978). After receiving what amounted to a promise that any sentence would be concurrent to that imposed in the Northern District of Illinois appellant agreed to submit his case to the court on stipulated facts consisting mainly of the record of the Chicago trial. Appellant was found guilty and sentenced to a term of fifteen years imprisonment to be served concurrently with the sentence already imposed in the Northern District of Illinois and a three year special parole term.[1]

Four issues are raised on appeal:[2]

1. the validity of the search warrant that opened appellant's premises;

2. appellant's right to attack the sufficiency of a wiretap affidavit and order;

3. whether the district court went outside of the record in determining guilt; and

4. whether the evidence proved appellant guilty beyond a reasonable doubt.

THE WARRANT

The Affidavit Statements

The case had its genesis in an investigation starting in 1976 by the Hartford office of the Drug Enforcement Administration (DEA). The investigation focused on one Rafael Kercado-Rivera of Springfield, Massachusetts. A court-authorized wiretap of Kercado-Rivera's telephone

[1] We note without comment that the Chicago conviction has been appealed, raising the possibility of reversal.

[2] Appellant again raises the double jeopardy issue, but we see no point in reconsidering and restating our opinion of January 6, 1978.

was installed, resulting in the intercept of two telephone conversations relative to bringing heroin from Chicago to Western Massachusetts. On December 15, 1976, Kercado-Rivera was called by Jose DeLeon of Chicago, an indicted coconspirator, and told that six kilos of heroin were available in Chicago at the price of $28,000 per kilo. Kercado-Rivera agreed to purchase one kilo. That same evening one Daisy Gonzales, known to be an acquaintance of Kercado-Rivera, made airline reservations to go to Chicago the next day. Neither appellant's name nor address was mentioned during either of the telephone calls intercepted.

After Hartford DEA agents had observed Gonzales board a flight to Chicago, this information, along with a physical description of Gonzales and Kercado-Rivera, was sent to DEA agents in Chicago. Gonzales was followed by DEA agents after she left O'Hare International Airport to a restaurant in Chicago where she met an individual who fit the description and was, in fact, Kercado-Rivera. A short time later, the two left the restaurant and drove to 3651 Belden Street, Chicago.

These facts, which are recited in paragraphs 1 through 7 of the affidavit underpinning the search warrant, are not challenged. Appellant's challenge to the validity of the warrant focuses on what was stated in the affidavit as to who left the Belden Street address after Kercado-Rivera and Gonzales had arrived there, and what that individual subsequently did. Paragraphs 8, 9, and 10 contain the following information. Kercado-Rivera left the Belden Street address carrying a brown paper bag and drove to 2514 West Hadden Street, which he entered with the bag. A short time later, he left the West Hadden Street residence with a white paper bag and drove back to the Belden Street address. Gonzales, Kercado-Rivera, and an unknown male left Belden Street together in an automobile which

proceeded to the intersection of Leavitt and Milwaukee Streets, where Gonzales and Kercado-Rivera left the automobile and took a taxi to O'Hare Airport.

Paragraphs 11 and 12, which are undisputed, state that both Gonzales and Kercado-Rivera took a flight to Hartford, that Gonzales was arrested on her arrival in Hartford and that the heroin she was carrying was seized, along with a white paper bag which bore a Chicago address.

On the basis of this information, a warrant was issued for the search of the residence at 2514 West Hadden Street, Chicago, the home of appellant. Five kilos of heroin were found in the basement of appellant's home. Drug related paraphernalia and $29,000 in cash inside a torn brown paper bag with Massachusetts bank wrappers were found after a search of the first floor.

Appellant attacks the search warrant on the basis of the incorrect statements in paragraphs 8 and 9 of the affidavit, that it was Kercado-Rivera who went from the Belden Street address to the West Hadden Street house and then returned to Belden Street. Based on the statements made by the DEA agents at the suppression hearing, it is clear that the person who visited West Hadden Street was Jose DeLeon and that the unknown male in the car that drove to the intersection of Leavitt and Milkaukee Avenues was also DeLeon. The identification of DeLeon by the DEA agents as the West Hadden Street visitor was made subsequent to the execution of the affidavit after the agents had an opportunity to examine photographs taken during the surveillance.

After a series of lengthy suppression hearings, the district court, in a written memorandum and order, found that the error in identification of the courier between Belden Street and West Hadden was "an honest mistake which was neither knowing, reckless, nor negligent." The court also found "that the identity of the courier was not a material fact in the establishment of probable cause."

The Law

Appellant's contention is deceptively simple. He argues that, since paragraphs 8 and 9 of the affidavit were factually incorrect, they must be eliminated and, if that is done, no probable cause existed for granting the search warrant for West Hadden Street and the warrant, therefore, falls.

The legal precedent applicable and followed when this case was before the district court was this court's opinion in *United States* v. *Belcufine*, 508 F.2d 58, 63 (1st Cir. 1974). In *Belcufine*, we held that evidence should be suppressed if it had been obtained in reliance on an intentional and material misstatement in an affidavit, but we did not consider whether suppression would be required if the statements were made recklessly. Since then, the Supreme Court has addressed the issue and has determined both the circumstances under which a defendant may challenge the veracity of an affidavit supporting a warrant and the consequences that follow if such a challenge is successful.

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks v. *State of Delaware*, 46 U.S.L.W. 4869, 4870 (June 29, 1978). The Supreme Court's decision in *Franks* made it clear that the reach of *Belcufine* must extend to statements made recklessly, but did not in other respects affect our prior holding. As the district court held a hearing and found that the statements in issue here were not made recklessly, this case can be analyzed appropriately under *Franks*. We need not consider whether that decision was retroactive, as it does not affect *Belcufine* in any way relevant here.

Initially, we note that, if the affidavit could be taken at face value, the information used to procure the warrant would clearly meet the *Aguilar-Spinelli* requirements. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964). In *Aguilar*, the Court held:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, *see Rugendorf* v. *United States*, 376 U.S. 528, was "credible" or his information "reliable."

Id. at 114. Here, although the affidavit stated that the initial tip came from a confidential informant of the Hartford DEA office, it, in fact, came from a legally authorized wiretap intercept of telephone conversations on Kercado-Rivera's phone. And the magistrate was so informed. The affidavit is precise as to times, places, and who was observed doing what. This clearly met the requirement that the magistrate be informed of some of the underlying circumstances so that he could determine whether

the informant was "credible" or his information "reliable." Based on the information contained in the affidavit, there can be little doubt that probable cause was established for a search of the West Hadden Street residence.

We now proceed to analyze the affidavit in the light of *Franks*. Although appellant's brief is liberally laced with the conclusory terms, "perjury" and "false statements" and urges that the identity statements in paragraph 8 and 9 of the affidavit were material, we are bound by the findings of the district court unless they were clearly erroneous.

At the lengthy suppression hearing, which was held on three different dates testimony to the following effect was given. At the time the affidavit was drafted, the affiant and surveillance agents believed that the person who went from the Belden Street premises to the West Hadden Street residence with a brown paper bag and returned to Belden Street with a white paper bag was, as the affidavit states, Kercado-Rivera. The description which the Chicago agents received from Hartford of Kercado-Rivera was that he was a Caucasian male of Puerto Rican extraction, height of between 5'6" and 5'8", weight about 170 pounds, short black hair and approximately 33 years old. DeLeon is also a Caucasian Puerto Rican male of similar height, although lighter in weight. Both men, according to the surveillance agents, wore dark slacks and leather jackets on the day in question. The agents observed a Puerto Rican male wearing a brown leather jacket leave the Belden Street address with a brown paper bag. A few minutes prior to this, an individual of the same general description had entered the building with Gonzalez. The agents testified at the suppression hearing that it was not until after surveillance photographs were developed on December 28, 1976, that they realized that the West Hadden Street visitor was someone other than Kercado-Rivera. It was not

until January of 1977 that the brown and white bag carrier was identified as Jose DeLeon.

The question under *Franks* is: Was the district court clearly erroneous in finding that appellant did not establish by a preponderance of the evidence that the affidavit misstatements were perjury or made with a reckless disregard of the truth *and*, if set aside, would render the balance of the affidavit insufficient to establish probable cause for the warrant?

We point out first that there is no dispute that Gonzales and Kercado-Rivera met in a restaurant and proceeded to the Belden Street address. Nor is there any question that a male left Belden Street with a brown bag, went to the West Hadden Street residence and returned to Belden with a white paper bag. There is and can be no challenge to the affidavit statement that Kercado-Rivera, Gonzales, and "an unknown male" left Belden Street together and drove to a point where Gonzales and Kercado-Rivera left the car and took a taxi to the airport. It is undisputed, as stated in the affidavit, that Kercado-Rivera and Gonzales then took the plane to Hartford where Gonzales was arrested in possession of approximately one kilo of heroin and a white paper bag with a Chicago address on it.

Given these undisputed facts, the incorrect identification of Kercado-Rivera as the one who went to West Hadden Street was not material. The key fact was that someone closely involved with Gonzales and Kercado-Rivera picked up a quantity of heroin at appellant's residence on West Hadden Street and delivered it to Gonzales. If the affiant had used the phrase "unknown male" instead of Kercado-Rivera, probable cause would still have existed for issuing the search warrant for Cruz's residence. The incorrect information was not necessary to a finding of probable cause.

While our finding that the misstatements in issue were not material is sufficient to dispose of this appeal, we note our agreement with the district court's finding, that the misstatements were made neither knowingly nor recklessly. This was a case of understandable mistaken identity, not the type of intentional misstatement covered in *United States* v. *Belcufine, supra*, 508 F.2d 58. As we said in *United States* v. *Cruz Pagan*, 537 F.2d 554, 557 (1st Cir. 1976): "We are convinced that the likelihood of the alleged discrepancies having any effect on the determination of probable cause was negligible, and that the policies underlying *Belcufine* simply are not called into play here." Nor is this the same kind of situation as in *United States* v. *Astroff*, 556 F.2d 1369 (5th Cir. 1977), where the affidavit contained a statement that would reasonably lead the magistrate to believe that suitcases had been opened and marijuana seen in them, when, in fact, the suitcases had not been opened and their contents observed. Nor do we have here a series of misrepresentations whose cumulative effect made it impossible for a neutral magistrate to exercise independent judgment. *United States* v. *Esparza*, 546 F.2d 841 (9th Cir. 1976).

We find that the district court's application of the *Belcufine* test was clearly correct and that, under the holding of *Franks*, the warrant was validly issued.

THE WIRETAP

Appellant's argument on this issue can be stated as follows: since the starting point for the issuance of the warrant came from information received as a result of a court-authorized wiretap, appellant has a right to disclosure of the information and supporting documentation used to obtain the order so that, if justified, he can attack the validity of the wiretap.

The district court found and we agree that appellant had no standing to obtain such information because he was not an "aggrieved person" within the meaning of the statute. 18 U.S.C. § 2510(11).[3] In *Alderman* v. *United States*, 394 U.S. 165 (1969), the Supreme Court analyzed in depth the impact of the fourth amendment on electronic surveillance, passed on the question of standing, and held:

> In these cases, therefore, any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations.

Id. at 176. We have also addressed the question of who is an "aggrieved person" under the statute. In *United States* v. *Plotkin*, 550 F.2d 693, 695 (1st Cir.), *cert. denied sub nom. Considine* v. *United States*, 434 U.S. 820 (1977), after an extensive review of the pertinent authority, we held:

> At the outset we note that all of the appellants are challenging the admission of the evidence on the ground that it is the fruit of an illegal wiretap which intercepted conversations of appellant Serino. None of the other appellants were allegedly overheard during any other illegal wiretap. Only appellant Serino therefore has standing to assert a violation of his Fourth Amendment rights in seeking to suppress the evidence.

Our position is not unique. *See, e.g., United States* v. *Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States* v. *Scasino*, 513 F.2d 47 (5th Cir. 1975).

---

[3] " 'Aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

Appellant urges, however, that, even if he is not an "aggrieved person" under the statute, he should have standing to explore the background of the order authorizing the wiretaps under the fourth amendment because it was his house which was searched. This is a beguiling argument, but, on scrutiny, withers to a frail reed. While the intercepts did instigate the surveillance, they in no way, directly or indirectly, pointed to appellant or his residence as the source of the heroin to be sold. Neither Cruz's name nor address came into the phone conversations at all. It was the surveillance of Gonzales, Kercado-Rivera, and the person who later turned out to be DeLeon which led the agents to appellant's residence as the probable drug supply source. The fourth amendment has two applications in this case: one to the electronic surveillance, and the other to the search warrant. Each is distinct and separate. Appellant was well within his rights in challenging the affidavit basis of the warrant which authorized the search of his home, but he has no standing to examine the authorization material for the wiretap since neither his phone nor his conversations was implicated. Our analysis of who is entitled to post interception notice of wiretap conversations applies here.

> With a conventional search, it has never been suggested that, when a letter in the possession of the primary target of the search contains communications from a third party, the third party is constitutionally entitled to notice and an inventory.

United States v. *Harrigan*, 557 F.2d 879, 884 (1st Cir. 1977). Here, we do not even have communications from the third party; all we have is information that resulted in surveillance of those whose conversations were heard which, in turn, led to appellant's home. The fourth amendment's protection against search by electronic surveillance

does not extend to one whose conversations were not involved in the wiretap.[4]

WHETHER THE DISTRICT COURT WENT OUTSIDE THE RECORD

During a lengthy discussion as to what counsel had agreed on as a stipulation to the bench trial, the court stated:

> THE COURT: Well, why not do this, since I think you can save yourselves a great deal of time—why don't I call a recess at this time, and you sit down with your client and the Government attorneys and go over this stipulation as such and determine what it is that is in it that hurts you as far as this case is concerned, and you still have your appeal rights obviously, and then if you can not agree to the signing of it, it seems to me that the Government at that point would have the opportunity to come forward and offer evidence as to what they feel is necessary to go forward with the conspiracy elements. Then it seems to me that you also would have the right to offer a defense, if you feel you want to, at that point, and I would not have to make a decision as to whether or not it is sufficient.

[4] Even if the authorization for the wiretap were found to be defective, we doubt that it would protect defendant here. "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

> The end result we are all talking about, that is as to a concurrent sentence, I would indicate to you now, and it is probably incorrect for me to say so, but I do offer to you now that I doubt every much if I would ever give you on and after sentence in this case where you have evidence as to two crimes from the same set of facts. You can rest assured that there probably would be no penalty attached to this whatever you do.
>
> MR. ACKERMAN: That is a consideration.
>
> THE COURT: But by the same token once again as the trial judge and the judge who heard an awful lot of evidence in this case from the motions to suppress, from the various plea bargains that did occur, and from the individual pleas that developed during the trial, and I don't know if you know this but they all did eventually plead—
>
> MR. ACKERMAN: I understand.
>
> THE COURT: They have all since been sentenced. *I heard all the elements, all the facts that would be necessary. I heard it repeatedly. I think I could be a pretty good witness, rather than a judge, at this point to talk about the evidence.* But anyway, from all this just determine in your own mind whether you can stipulate. Then I would hear arguments on your motion for acquittal, and from the Government as to whether they feel there is enough evidence to sustain a conviction. Then I would have to make a determination (emphasis added).

Appellant has seized upon the underscored sentences as showing that in deciding the case the trial court went outside the record. This, we think, is a distortion of what was said and what was intended. The judge, in trying to be fair, pointed out that before accepting the pleas from the eight codefendants the basic facts had to be outlined to

him for each pleading defendant. Appellant has not pointed to anything in the court's opinion that suggests or implies that the court considered anything other than the material submitted. Moreover, appellant's counsel agreed to the bench trial *after* the court's remarks.[5]

Appellant also suggests that the court's reference to the Chicago conviction indicates that it was unduly influenced by it. This reference came during a colloquy with the prosecutor when the United States Attorney was urging the court to find appellant guilty of conspiracy. The court stated:

> THE COURT: Aside from the fact that he was in possession of the heroin in question, and for that he has been convicted, and that is a crime standing by itself, where is the agreement you can find that this Court can sustain beyond a reasonable doubt that DeLeon or anyone else entered into an illicit transaction?

Obviously, the court was excluding appellant's Chicago conviction from consideration, not using it as evidence. Appellant's reliance on *United States* v. *Hamrick*, 293 F.2d 468 (4th Cir. 1961), is inapt. In that case, the trial court

[5] The two cases cited by appellant are inapposite. In *United States* v. *Vaughn*, 443 F.2d 92 (2d Cir. 1971), the trial court's determination of guilt was reversed because it continuously referred to a letter written to the court by the defendant prior to trial and not introduced in evidence. *United States* v. *Lookretis*, 398 F.2d 64 (7th Cir. 1968), is a little more complicated but clearly distinguishable as well. The order of the circuit court, *United States* v. *Lookretis*, 385 F.2d 487 (7th Cir. 1967), *vacated*, 390 U.S. 338 (1968), was vacated by the United States Supreme Court following its decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968). The case had been tried in the district court on a stipulation of facts prior to *Marchetti*. On remand, the government urged that the harmless error rule should apply to the district court's opinion. The court ruled otherwise. It felt that the trial judge, being without the benefit of *Marchetti*, might have relied on evidence that *Marchetti* had subsequently held unconstitutional and inadmissible.

was reversed for examining the defendant's criminal record which was not in evidence during the trial and before verdict. Here, appellant, himself, had expressly stipulated that the record of the trial in which he had been convicted was to be submitted to the court as evidence. To complain now that the judge was prejudiced because he knew of appellant's conviction for possession of heroin is carrying advocacy beyond the bounds of reason and fairness.

THE EVIDENCE

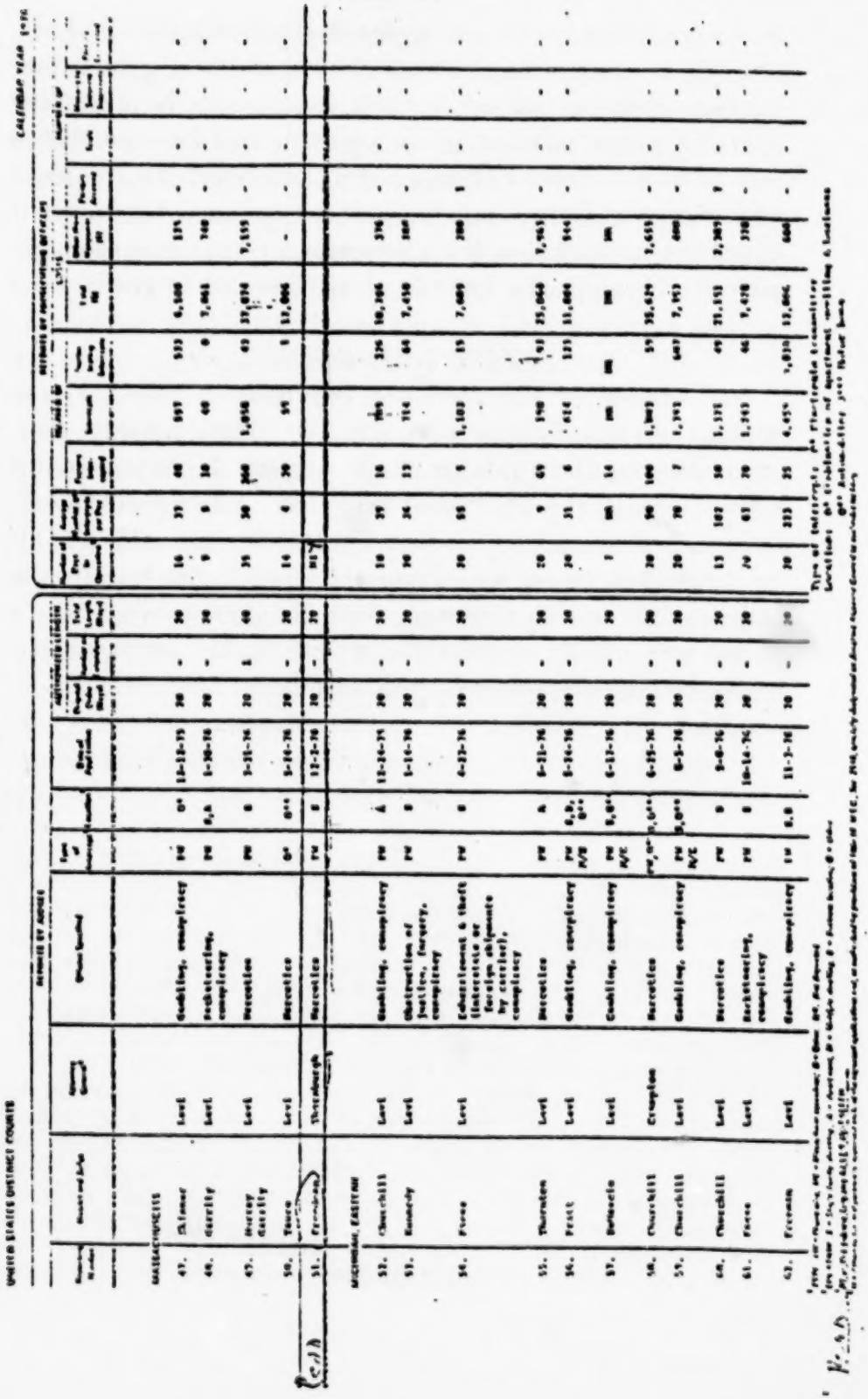
Our review of the evidence convinces us that it was sufficient for a finding of guilt. We state frankly that, even viewing the evidence from a neutral vantage point rather than in the light most favorable to the government, it is still clear and convincing beyond a reasonable doubt. As appellant recognized from the outset, the key to the case was the search warrant. Once the door to appellant's house was legally opened for a search, his participation in the conspiracy was exposed.

Affirmed.

APPENDIX B

REPORTS CONCERNING COURT AUTHORIZED INTERCEPTS OF WIRE OR ORAL COMMUNICATIONS PURSUANT TO TITLE 18, UNITED STATES CODE, SEC. 2519

UNITED STATES DISTRICT COURTS



APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable JOHN F. GRADY

No. 76CR1285 (D1) Date Dec. 28, 1977

U.S.A. v. Herminio Cruz

For Trial

Motion of the govt. made orally to continue the trial of this cause is denied. Trial held—Jury. Jury impaneled. Trial adjourned to December 29, 1977 at 9:30 a.m.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America — SECRET INDICTMENT

vs. — CRIMINAL NO. 77-205-F

RAFAEL KERCADO-RIVERA, a/k/a "FEFO"
NORMA RIVERA
PEDRO RIVERA-KERCADO, a/k/a "CHICKIE"
LADISLAO KERCADO-RIVERA, a/k/a "LADDY"
EFRAIN COLON
ANGEL COLON, a/k/a "VIETNAM"
JOSE DeLEON
MARIA DeLEON
HERMINIO CRUZ

The grand jury charges:

COUNT I

That between on or about January 1, 1974, up to and including on or about April 30, 1977, at Springfield, and Holyoke, in the District of Massachusetts; Windsor Locks, Connecticut; Hartford, Connecticut; Chicago, Illinois; and Hato Rey, Puerto Rico and elsewhere

RAFAEL KERCADO-RIVERA, a/k/a "FEFO"
NORMA RIVERA
PEDRO RIVERA-KERCADO, a/k/a "CHICKIE"
LADISLAO KERCADO-RIVERA, a/k/a "LADDY"
EFRAIN COLON
ANGEL COLON, a/k/a "VIETNAM"
JOSE DeLEON
MARIA DeLEON
HERMINIO CRUZ

named as defendants herein, and Daisy Gonzalez, Carmen Rosario, Lucy Ortiz, and Reuben Collazo, named as co-conspirators but not as defendants herein, did willfully, knowingly and intentionally conspire, combine, confederate and agree with each other and with divers other persons whose names are to the Grand Jury presently unknown, to commit an offense against the United States; that is, to knowingly and intentionally distribute a quantity of heroin, a Schedule I controlled substance in violation of Title 21, United States Code, Section 841 (A)(1), all in violation of Title 21, United States Code, Section 846.

That in furtherance of the conspiracy:

1. On or about December 5, 1976, Rafael Kercado-Rivera, a/k/a Fefo of 122 Brown Avenue, Holyoke, Massachusetts, requested Jose DeLeon and Maria DeLeon of 3561 West Belden Street, Chicago, Illinois, to purchase a quantity of heroin for him.

2. On or about December 7, 1976, Maria DeLeon told Rafael Kercado-Rivera, a/k/a Fefo that there was no heroin available for purchasing at that time.

3. On or about December 7, 1976, Rafael Kercado-Rivera, a/k/a Fefo discussed the availability of heroin in Chicago, Illinois, with Pedro Rivera-Kercado, a/k/a Chickie.

4. On or about December 11, 1976, Rafael Kercado-Rivera, a/k/a Fefo discussed the availability of heroin in Chicago, Illinois, with Ladislao Kercado-Rivera, a/k/a "Laddy".

5. On or about December 15, 1976, Rafael Kercado-Rivera, a/k/a Fefo, of 122 Brown Avenue, Holyoke, Massachusetts, did agree with Jose DeLeon and Maria DeLeon, of 3561 West Belden Street, Chicago, Illinois, to purchase a quantity of heroin, to wit one kilogram for approximately $28,000, on December 16, 1976.

6. On or about December 15, 1976, Daisy Gonzalez did at the request of Norma Rivera and Rafael Kercado-Rivera, a/k/a Fefo make a reservation aboard Trans World Airlines Flight 175 for a one-way fare to Chicago, Illinois from Bradley International Airport, Windsor Locks, Connecticut, leaving Bradley International Airport at 9:45 a.m., December 16, 1976, and arriving at Chicago, Illinois, at 11 a.m., December 16, 1976.

7. On or about December 15, 1976, Rafael Kercado-Rivera, a/k/a Fefo, did give a sum of money to Daisy Gonzalez to pay for Daisy Gonzalez's fare aboard Trans World Airlines Flight 175 from Bradley International Airport, Windsor Locks, Connecticut to Chicago, Illinois.

8. On or about December 16, 1976, Rafael Kercado-Rivera, a/k/a Fefo, did travel from 122 Brown Avenue, Holyoke, Massachusetts, to Bradley International Airport, Windsor Locks, Connecticut.

9. On or about December 16, 1976, Rafael Kercado-Rivera, a/k/a Fefo, did travel aboard United Airlines Flight 123 to O'Hare International Airport, Chicago, Illinois.

10. On or about December 16, 1976, Norma Rivera did transport Daisy Gonzalez from 122 Brown Avenue, Holyoke, Massachusetts, to Bradley International Airport, Windsor Locks, Connecticut.

11. On or about December 16, 1976, Norma Rivera did give to Daisy Gonzalez a sum of money which Daisy Gonzalez did transport aboard Trans World Airlines Flight 175 to Chicago, Illinois.

12. On or about December 16, 1976, Daisy Gonzalez met Rafael Kercado-Rivera, a/k/a Fefo, at the Taco Loco Restaurant, corner of North and Western Avenues, Chicago, Illinois.

13. On or about December 16, 1976, Rafael Kercado-Rivera, a/k/a Fefo and Daisy Gonzalez did then proceed by car to 3561 West Belden Street, Chicago, Illinois, address of Jose and Maria DeLeon and did enter said address.

14. On or about December 16, 1976, Jose DeLeon did exit 3561 West Belden Street, Chicago, Illinois, carrying a brown paper bag which contained a sum of money.

15. On or about December 16, 1976, Jose DeLeon did proceed to the residence of Herminio Cruz, 2514 West Haddon Street, Chicago, Illinois.

16. On or about December 16, 1976, Jose DeLeon did enter the residence of Herminio Cruz, 2514 West Haddon Street, Chicago, Illinois, carrying the brown paper bag containing a sum of money.

17. On or about December 16, 1976, Jose DeLeon did exit the residence of Herminio Cruz, 2514 West Haddon Street, Chicago, Illinois, carrying a white paper bag containing a quantity of heroin.

18. On or about December 16, 1976, Jose DeLeon did enter 3561 West Belden Street, Chicago, Illinois, carrying a white paper bag where Jose DeLeon again met with Rafael Kercado-Rivera, a/k/a Fefo, and Daisy Gonzalez.

19. On or about December 16, 1976, Jose DeLeon, Rafael Kercado-Rivera, a/k/a Fefo, and Daisy Gonzalez did then enter a 1977 silver Chevrolet automobile and proceed from 3561 West Belden Street, Chicago, Illinois, to the intersection of Milwaukee Avenue and Leavitt Street, Chicago, Illinois.

20. On or about December 16, 1976, Jose DeLeon did then and there, engage a taxi cab to transport Rafael Kercado-Rivera, a/k/a Fefo, and Daisy Gonzalez to O'Hare International Airport, Chicago, Illinois.

21. On or about December 16, 1976, Rafael Kercado-Rivera, a/k/a Fefo, and Daisy Gonzalez did then purchase two, one-way airline tickets from O'Hare International Airport, Chicago, Illinois to Bradley International Airport, Windsor Locks, Connecticut.

22. On or about December 16, 1976, Rafael Kercado-Rivera, a/k/a Fefo, and Daisy Gonzalez did then travel from Chicago, Illinois, to Windsor Locks, Connecticut, aboard Trans World Airlines Flight 82.

23. On or about December 16, 1976, at Bradley International Airport, Windsor Locks, Connecticut, Daisy Gonzalez did take custody of a brown suitcase which had been provided to her by Rafael Kercado-Rivera, a/k/a Fefo, and which contained a quantity of heroin enclosed in a white paper bag.

24. On or about December 16, 1976, Daisy Gonzalez did then transport the brown suitcase containing a quantity of heroin to Springfield, Massachusetts.

25. On or about December 12, 1976, at the Mayfair Tavern, Holyoke, Massachusetts, Efrain Colon and Angel Colon, a/k/a Vietnam, did offer to distribute a quantity of heroin to Jose Rosario.

26. On or about December 12, 1976, at the time that Efrain Colon and Angel Colon, a/k/a Vietnam, offered to distribute a quantity of heroin to Jose Rosario, Efrain

Colon told Jose Rosaria that they were expecting a further shipment of heroin at the end of the week.

27. During June of 1976, Rafael Kercado-Rivera, a/k/a Fefo, did employ Lucy Ortez and Carmen Rosario to transport a sum of money from Bradley International Airport, Windsor Locks, Connecticut, to Chicago, Illinois.

28. During June of 1976, Lucy Ortez and Carmen Rosario did travel from Bradley International Airport, Windsor Locks, Connecticut, to Chicago, Illinois, and did carry with them a sum of money.

29. During June of 1976, Lucy Ortez and Carmen Rosario did meet Jose DeLeon at O'Hare International Airport, Chicago, Illinois.

30. During June of 1976, Lucy Ortez and Carmen Rosario did then transport a sum of money to the residence of Jose DeLeon and Maria DeLeon in Chicago, Illinois.

31. During December, 1975, Rafael Kercado-Rivera, a/k/a Fefo, did employ Carmen Rosario to transport a sum of money from Bradley International Airport, Windsor Locks, Connecticut, to Chicago, Illinois.

32. During mid-1974, Jose DeLeon told Reuben Collazo that Rafael Kercado-Rivera, a/k/a Fefo, and Pedro Rivera-Kercado, a/k/a Chickie, had purchased a quantity of heroin from him.

GROUP APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 77-205-F FREEDMAN, D.J.

UNITED STATES OF AMERICA
v.
HERMINIO CRUZ

Appearances: David P. Twomey, Esq., Assistant United States Attorney, for the government.
Allan A. Ackerman, Esq., for the defendant.

Courtroom No. 3,
Federal Building,
Boston, Mass.
January 5, 1978

The Clerk: United States of America v. Herminio Cruz.

Mr. Twomey: Your Honor, Mr. Ackerman is present in court this morning representing the defendant Cruz with defendant's motion to dismiss the indictment.

The Court: I have read the brief for the defendant as well as the government's response. Do you wish to add anything briefly to that?

Mr. Ackerman: Your Honor, I think the written memorandum sufficiently covers what I wanted to present to the Court. However, in fairness to the Court I would like to state that the pretrial and the trial transcripts of the Chicago proceedings which I make allusion to in the motion, and which carry significant input for the position we take, are not as yet prepared and apparently will not be available until late tomorrow because the court reporter took a vacation.

The Court: Incidentally, was this motion ever pressed previous to the Illinois trial?

Mr. Ackerman: In your court?
The Court: No, in Illinois?
Mr. Ackerman: In Illinois? Yes.
The Court: Therefore, you cannot proceed there?
3 Mr. Ackerman: Your Honor, I note you just received this motion. I had not brought it here until approximately 11:00 a.m. However, you will find that Group Exhibit 4 in my memorandum indicates that a pleading was filed, Group Exhibit 4 was filed with the Court on November 17, 1977, and the proceedings in Chicago did not actually convene until December 19, 1977, some 30 days or so after that.

At that point in time Mr. Prince, who is not in the courtroom this morning, but who was in Chicago along with the Chicago prosecutors, was there, and at that time all the problems relating to these proceedings were aired before Judge Grady.

Judge Grady suggested that the government can act as they desire because it would appear to him that if it was carried over to Massachusetts, and his trial was not aborted but merely delayed, that in that event Mr. Cruz would have a similar motion in Chicago on his calendar at a future date.

The Court: I see.

Mr. Ackerman: However, on December 28, the day the jury was actually selected, government counsel Mr. McQueen, did ask Judge Grady for a continuance. Mr. Cook, another government prosecutor on the Chicago case, when asked directly by Judge Grady if
4 he chose to dismiss without prejudice so the Massachusetts case could go forward without incident or delay said no, they are ready for trial and wanted a trial immediately. Ergo, Judge Grady proceeded with the selection of the jury.

The Court: I see.

Mr. Ackerman: I do not have the transcript obviously, but I make reference to that which I told the Court and I direct your Honor's attention—

The Court: Mr. Ackerman, when was the verdict actually received? Was it on Tuesday?

Mr. Ackerman: It was January 3, 1978, in open court, at 9:30 a.m.

The Court: Was this a one-count indictment?

Mr. Ackerman: The indictment, your Honor, is reproduced here as Exhibit 2, if my recollection serves me correctly. It certainly should be. Unfortunately the printer did not do the kind of job as well as it could have been in the short space of time we had but it is reproduced.

The Court: I have it.

Mr. Ackerman: The critical point, if there can be such a thing as a critical point, is that in 1977 the Supreme Court ruled in Jeffers versus the United
5 States that for all the problems as between Title 21 and its various subsections—and all are reproduced in part in that decision, including 841(a)(1), which is what we stood trial on in Chicago, the critical point there was the Court did not actually find the case of Ianelli versus the United States controlled Jeffers. Jeffers was strictly not a statutory construction case, but a Fifth Amendment case, and because Jeffers opted —he did not want a consolidated trial, there being two indictments, and the government moved to consolidate both—he objected, and the majority opinion—I'm sorry, the plurality opinion there found, and I have reproduced Pages 7 and 8 of my memorandum—I have reproduced the plurality court's views on why Mr. Jeffers was not entitled to double jeopardy relief, and they say simply and in effect, "Under the circumstances we hold that his action deprived him of his right that he might have had against consecutive trials."

In the case at bar Mr. Cruz was available in Chicago or in Massachusetts. We offered to elect or consolidate, anyway the government wanted. The government opted to go forward in two jurisdictions. That is the substance of our claim.

The Court: All right.

Mr. Ackerman: I will say this. I have done everything I could to expedite this as quickly as I could, including working almost all night January 3 and completing this on January 4, and coming here today.

The Court: The Court appreciates your attempt to go forward as quickly as possible and also appreciates the fact that you are not next door but from Illinois.

Mr. Ackerman: I would have preferred to be able to do this on December 22, which was the status date that the Court previously set, but on that very day, as counsel, government counsel knows, I was on trial in Chicago in the Cruz case.

The Court: Mr. Twomey, do you wish to add anything to the memorandum you have filed?

Mr. Twomey: The government would stand on its memorandum, your Honor. However, there are two matters I would like to point out to the Court. However, in conversations I have had with the Assistant United States Attorney, Mr. McQueen, that Mr. Ackerman has made reference to, and also Mr. Cook, Mr. Ackerman made reference also to him, I would direct the Court's attention, if I may, to Page 5 of Mr. Ackerman's memorandum, and specifically the paragraph right above the
7 paragraph headed V, starting off, "The jury was selected." With respect to the statement there that beyond dispute some of the conspiracy evidence was received by the trial jury in Chicago, I have been informed by the assistants in Chicago, and I so believe unless Mr. Ackerman corrects me, that their direct case, the testimony presented there, started with Agent Robert Schuler and the events surrounding the surveillance initiated at approximately 9:45 or thereabouts that morning.

In the government's direct examination of its witnesses it did not present or seek to present any evidence as to any events that took place either prior to that point of time or after the individuals named in Mr. Ackerman's memorandum, Mr. Rivera and Daisey Gonzales, returned to the Connecticut area and subsequently to western Massachusetts.

I have been informed and so believe by Mr. McQueen that on cross examination that area was opened up by Mr. Ackerman and was objected to by the government following a bench conference before Judge Grady. He determined it was relevant and allowed Mr. Ackerman to proceed.

Furthermore, as to the search warrant and the affi-
8 davit attached thereto, that was offered in evidence and accepted as an exhibit by the defense.

The area with respect to conspiracy evidence, and specifically that area in parenthesis, is what I direct myself to. The heroin seizure in Connecticut and the Massachusetts money wrappers was an area that was opened up on cross examination by the defendant and not by the government.

There is just one other point. The defendant relies on Jeffers. The government feels it would be remiss, although we feel we have covered it adequately in our memorandum to the Court, but we would emphasize the fact that Jeffers concerned a violation of 21 United States Code Section 848, which is the continuing criminal enterprise statute, and 21 United States Code Section 846, which is the Narcotics Conspiracy Statute, and I think in reading that opinion the Court can well see that the Supreme Court went into a lengthy discussion as to the congressional intent and also the wording in the statute, and that 848 uses the words "five or more individuals," and also uses the key words "conserted action", and 846, using the word "agreement", the Court found that one in essence would be the lesser included offense of the other.

9 Other than that, your Honor, the government would stand on the memorandum it has filed.

The Court: I would like to extend the Court's appreciation to Mr. Ackerman in sending a letter to the Court about two weeks ago indicating that if the Illinois case went to trial you intended to file a motion

that you have filed and that gave me advance notice, and you did cite authorities for what you are attempting to elocute in your motion for dismissal on the grounds of double jeopardy, if that did occur in Illinois, and I thank you for that.

I also wish you to know that under the circumstances of getting a decision on the third I believe you proceeded properly in getting this motion to the Court as expeditiously as you could. I also want to note that the government responded expeditiously. So both parties stand before the Court on proper grounds.

I have gone through the memoranda as best I could in the time I had, and I have looked up the law previous to your arrival today and I am aware of some of these cases because I have gone into them. I had some notes prepared. As you will note I have not taken any handwritten notes on anything you have stated here.

10 I noted that Jeffers, and Mr. Twomey touched on it, involved prosecutions under 21 United States Code Sections 846 and 848, 846 being the conspiracy statute and 848 being the acting in concert statute. Both require concerted activity. This is in contrast to the Chicago convention under 21 United States Code, Section 841 (a)(1), which is the possession and distribution statute. It does not require concerted action. Therefore I find the transcripts as to what occurred in Illinois, for example, are not necessary for me to make a decision.

I am going to deny your motion to dismiss on the grounds of double jeopardy. I appreciate that under Abney you have an immediate interlocutory right of appeal. I urge you to proceed in taking that appeal. The court of appeals, I understand, by way of the clerical staff, has already been notified of the fact that you may in fact, assuming my decision was in this vein, might be arriving today, would be arriving on the scene. I don't know if they will hear you. The judges have not been notified. The clerks have. What

they will do with it I have no idea. It is up to them to arrange their schedule.

11 I want you to note that unless I hear from the court of appeals to the contrary, the case scheduled for trial on Monday in Springfield is still on. If they stay it, of course, I will be notified to that effect. I urge you to try your appeal forthwith.

Mr. Ackerman: Your Honor, I have prepared a notice of appeal. I will go right up to the 16th floor.

The Court: I don't know what their schedule is.

Mr. Ackerman: I will alert the Court, as the Court alerted me the last time this happened, and the only recorded case I found is cited in my memorandum, and while it rules against me, at least in part it explains the process, and that is on Page 13, Footnote 22. It indicates that the Tenth Circuit in a similar situation had the issues briefed and assigned expeditiously in accordance with a footnote in Abney which directs that the courts of appeal do the same.

I had a similar situation in the Seventh Circuit and they set a briefing schedule of seven, five and two, allowed all argument on the last day and expeditiously ruled.

12 The Court: Whatever they do is fine. Obviously if they give you that time period they will be issuing a stay of the trial in Springfield, and that will take care of that. I will leave that up to them.

Mr. Ackerman: I will report back to your Honor. I do not know that of necessity they have to answer any ruling indicating a stay. I am doing what the Constitution compels me to and what the Supreme Court allows me to do, and anything further I am at the mercy of the Court one way or the other, and of course I will provide a brief, if the Court desires a brief, as expeditiously as I can.

The Court: They may be satisfied with just this brief. I don't know.

Mr. Ackerman: Without a transcript I am hard pressed to understand how a court of review could take any position.

The Court: They also may not agree with me. As I stated in my findings I do not think the transcript is needed. As I say, they may disagree. Why don't you go forward with your appeal and whatever happens will happen.

Mr. Ackerman: Do I file the original notice with
13 Mr. Fagan? If so, I am prepared to do that forthwith.

The Court: Mr. Fagan will handle that. Thank you very much. The Court will take a brief recess.

14 CERTIFICATE

I, Charles T. Duffey, Official Court Reporter for the United States District Court, do hereby certify that the foregoing transcript, Pages 2 through 13, inclusive, is a true and accurate transcript of my stenographic notes taken in the above-entitled case.

/s/ Charles T. Duffey

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
VS. #77-00205-F
HERMINIO CRUZ et al

LOBBY CONFERENCE HELD AT THE UNITED STATES DISTRICT COURT, SPRINGFIELD, MASSACHUSETTS, ON JANUARY 11, 1978, BEFORE JUDGE FRANK H. FREEDMAN

Appearances:

Representing the United States:
David P. Twomey, Esquire

Representing the Defendant Herminio Cruz:
Allan A. Ackerman, Esquire

Martha A. Smith
Certified Shorthand Reporter

2 Mr. Ackerman: I have heretofore filed an appearance for Herminio Cruz and at this time I am seeking a Severance from the trial in chief and asking permission to submit to the bench pursuant to Rule 23C. The Severance can be under Rule 8 or Rule 14.

This Court is aware that Mr. Cruz stood a jury trial in Chicago, Illinois, in connection with an indictment charging him with various narcotics events. The essence of that case, as I have been advised by the Government, would be approximately 99 percent the same. With the Court's permission and after conversation with the Government, we would ask this Court to consider his case as a bench matter based on the Government's case in chief in this case, deleting the admission or confession made by Mr. Cruz. The Defendant would offer no evidence on his behalf. The transcript is already prepared and will be forwarded directly to Mr. Fagan. I would indicate in the Index, both to the Government and to the Court, the Government's case if chief by pages 1 to 24—36, or whatever it might be.

The Government of course takes the position that that transcript will provide more than adequate grounds for a finding of guilty. On the other hand,
3 the defense would take the position that it could not stand a finding of guilty. But, in any event, that would be the Court's decision.

In addition to that, Mr. Cruz understands he's giving up his right to a trial by jury by agreeing to this, but understands he is preserving any rights to appeal.

It is further my understanding that the Government is going to withdraw any request for an accelerated sentence. And it is further my understanding that with a finding of guilty by this Court, the Government would be recommending a sentence of 15 years concurrent; that is to go along with a sentence Judge Grady imposes, and I understand the Government's position, if Judge Grady imposes a ten year sentence, there would be a five year overlap up to an aggregate to 15 years.

The Court: When is the sentencing scheduled?

Mr. Ackerman: February 8, 1978. Whether the presentence investigation would be fully completed by that time, I don't know whether it would be, and the post-trial motions have not been prepared because I have been here, but I would assume if it wasn't February 8, it would be February 15. In that time frame.

4 Mr. Toomey: With respect to the representations made by Mr. Ackerman, the Government's position is that prior to the time that any transcript is forwarded to this Court to Mr. Fagan, with the deletions made therein, that the Government has not seen that trial transcript yet and would want to review the same and concur or possibly object to whatever is deleted or left in and then file it on a stipulated basis between Mr. Ackerman and myself.

The Court: Well, as soon as you two have gotten together on the transcripts, what you can agree to as far as the stipulations, then prepare it accordingly, notify Mr. Fagan and set this down for a hearing before the Court probably sometime early next week.

Mr. Ackerman: What I will do is I will index the Government's case in chief and send it directly to Mr. Toomey as opposed to Mr. Fagan. I won't delete anything from the transcripts, but indicate what we feel is relevant, and with that we would offer our submission to the Court. Our case in based on that. We won't delete anything. Just indicate what we feel is appropriate.

The Court: Mr. Cruz, do you understand everything Mr. Ackerman has stated and do you agree to it?

Mr. Cruz: Yes.

5 The Court: Then the Defendant's request to sever his trial from 77-00205-F and election to be tried before the Court, jury waived, and waiving his right of trial by a jury, is allowed.

As soon as the transcripts have been prepared and counsel have gotten together on a stipulation to be presented before the Court, the Court will be notified and set this down for an early date and as soon as you're prepared you'll come back in here for this trial before the Court.

Mr. Ackerman: Of course the Government and the Court are aware that we feel we have a substantial double jeopardy claim.

The Court: Well, your appeal rights are protected for the record. They are preserved.

(*End of Lobby Conference.*)

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6 COMMONWEALTH OF MASSACHUSETTS
COUNTY OF HAMPDEN

I, MARTHA A. SMITH, Certified Shorthand Reporter, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes to the best of my knowledge and ability.

/s/ Martha A. Smith
Certified Shorthand Reporter

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